IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 223

SARA ADLER (now Sara Cowley-Brown),
Petitioner,

vs.

SIDNEY ADLER,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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CHAMPLIN-SHEALY COMPANY, CHICAGO

Summary of Reply Argument.

I. and II.

PAGE

The petitioner's contention is not that the decision of the State Court was merely an erroneous one, but that the court lacked jurisdiction and power under the laws of the State of Illinois to abrogate the contract and the trust indenture in question and thereby violated the due process clause of the State Constitution (Art. II, Sec. 2) and in turn violated the due process clause of the Federal Constitution applicable to the State (Amend. 14, Sec. 1) 3-5

III.

A Federal question is raised in this case by construing the Act of 1933 which amended Sec. 18 of the Illinois Divorce Act, by providing that alimony shall not be allowed on remarriage, as applicable retroactively to a consent decree entered in 1922, thereby denying due process of law and impairing the obligation of contract under the State and Federal Constitutions .. 6-7

A Federal question is raised since the State matters ruled upon, such as changed financial condition and remarriage, will not adequately and independently sustain the decision of the State Supreme Court, and the petitioner is vitally affected by the application of the Act of 1933 7-9

Table of Cases.

Statutes.

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REPLY TO RESPONDENT'S STATEMENT OF CASE.

The petitioner wishes to call attention to a misstatement in respondent's statement of the case on P. 2 wherein the estate conveyed to Sara Adler by Sidney Adler under the trust indenture of December 30, 1920, is referred to as an *estate pur autre vie.* The estate conveyed by Sidney Adler in both the trust indenture of December 30, 1920, and the trust indenture of December 1, 1922, was *an estate for her life and not for his.* An estate *pur autre vie* would be an estate for his (grantor's) life. (Bouvier's Law Dictionary, Rawles, 3rd Edition, defining Estate for Life.)

The trust indenture of December 30, 1920 (R. 12-17) was a conveyance to the trustees, as grantees, of *"a life estate for and during the lifetime of the said Sara Adler"* (R. 13). This interest is specifically referred to as a life estate in many instruments signed by Sidney Adler, as follows: Trust Agreement of December 30, 1920 (R. 56-62 at 56); Conveyance of December 26, 1922 (R. 202-203, at 203); Supplemental Trust Indenture of December 1, 1922 (R. 17-24 at 17, 18); and Supplemental Agreement of December 1, 1922 (R. 24-35 at 25).

In the Supplemental Trust Indenture of December 1, 1922, the conveyance is also for her life. It is provided that "the said trustees shall pay to the said Sara Adler, out of the net income of said property, in addition to the sum of Thirteen Hundred and Fifty Dollars ($1350.00) already secured to her by said Trust Indenture of December 30, 1920, the further sum of Eleven Hundred and Fifty Dollars ($1150.00) per quarter, *making in all the sum of Twenty-five Hundred Dollars ($2500.00) quarterly for and during her natural life.*" (R. 19, 20.)

The total payment of $2500.00 a quarter from both trust indentures was to be paid for the *natural life of Sara Adler from the trust.* His obligation to make up any *deficiency* ceased upon his death as to the $1150.00 quarterly payments. (R. 29.)

In the divorce decree of December 2, 1922, it is stated, "The court is further advised by counsel and doth find that an agreement has been reached by the parties hereto to pay to said Sara Adler *the additional sum of Eleven Hundred Fifty Dollars ($1150.00) quarter yearly for her life,* making in all Twenty-five Hundred Dollars quarter yearly * * *" (R. 6).

On Page 4 of respondent's brief, the income of the respondent is placed at less than $15,000.00 a year and prop-

erty valuation at $225,000.00. This is not an adequate statement of the matter since many items, such as capital gains (R. 116-130), free rent (R. 141), and income from the trust property to either his second wife (R. 140) and income therefrom for the benefit of Sara Adler, are not included. Neither is the trust property included in the valuation. (Summarized R. 266-270.)

REPLY TO RESPONDENT'S ARGUMENTS I AND II.

The petitioner's contention is not that the decision of the State Court was merely an erroneous one, but that the Court lacked jurisdiction and power under the laws of the State of Illinois to abrogate the contract and the trust indenture in question. The State Court in exercising this power in the case violated the due process clause of the State Constitution (Art. II, Sec. 2) and in turn violated the due process clause of the Federal Constitution applicable to the States (Amend. 14, Sec 1).

The prohibition of the 14th Amendment of the Federal Constitution extends to all acts of the State, whether acting through its legislative, its executive, or its judicial authorities. Judicial proceedings are governed by the requirement of due process of law and are subject to that restriction in Art. II, Sec. 2 of the State Constitution and Sec. 1 of the 14th Amendment to the U. S. Constitution.

People v. *Belcastro,* 356 Ill. 144.
Scott v. *McNeal,* 154 U. S. 34.
Virginia v. *Rives,* 100 U. S. 313, 318.

No judgment of a court is due process of law if rendered without jurisdiction in the court. Due process of law means a course of legal proceedings according to the rules established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by

its constitution and laws to pass upon the subject matter of the suit.

Scott v. *McNeal,* 154 U. S. 34.

Thirty days after the decree of divorce has been entered, the court loses all jurisdiction to change its decree, except as to the power reserved under Sec. 18 of the Divorce Act, whereby the court may *modify decrees of alimony,* but such court has no jurisdiction of the subject matter of a valid independent contract, or of a valid irrevocable and completely executed trust.

Smith v. *Johnson,* 321 Ill. 134.
Kelley v. *Kelley,* 317 Ill. 104.
Smith v. *Smith,* 334 Ill. 370.
Keene v. *Keene,* 241 Ill. App. 414.
Ill. Rev. Stat. (1939) Ch. 110, Sec. 174, Par. 7.

The trust indentures and contracts were carefully drawn and their validity is not questioned. These contracts constitute property rights. The court cannot make a new contract for the parties, nor provide for new provisions governing the trustees.

Chicago Title & Trust v. *Robin,* 361 Ill. 261.

The decree entered in 1922 was simply an approval of the terms of a contract settling all property rights including alimony, and in lieu of alimony (R. 5-8). In Illinois a property settlement may be made and an allowance in gross given which is a full discharge of all obligations of the marriage between the parties, and may not be modified by the court under Sec. 18 of the Divorce Act.

Plaster v. *Plaster,* 47 Ill. 290, 294.
McKey v. *Willett,* 248 Ill. App. 602.

Furthermore, the trust conveyance was completely executed and became an irrevocable conveyance as between the parties thereto (*Ehlers* v. *Ehlers,* 259 Ill. App. 142, 148).

Even past due alimony is a vested debt, and that which is paid is a debt discharged and cannot be modified or set aside by the courts of the State of Illinois.

Craig v. *Craig,* 163 Ill. 176.

Helkelkia v. *Sonzinski,* 223 Ill. App. 30.

The respondent on Page 8 of his brief erroneously states that the cases cited by the petitioner are from states where there was no statute in force at the time of the entry of the respective alimony decrees which permitted the court to modify the alimony payments because of changed conditions.

The very point in issue in the cases cited by the petitioner was whether a statute of the state permitting modification of alimony decrees for changed circumstances applied to a decree which embodied contract provisions such as exist in the *Adler* case, and which could not have been entered except by consent (*Pryor* v. *Pryor,* 88 Ark. 302, 308). In fact, one of the cases cited in the petition, that is, *North* v. *North,* 339 Mo. 1226, the Supreme Court of Missouri not only refused to apply such a statute to the contract provisions but expressly holds in error the Missouri Appellate Court case of *Hayes* v. *Hayes,* 75 S. W. (2) 614, cited by the respondent in his brief. The *Hayes* case did apply a similar statute and for that reason was held erroneous.

REPLY TO RESPONDENT'S ARGUMENT III

It is contended by opposing counsel that no Federal question is raised in this cause.

We point out, however, that a Federal question is raised where the Supreme Court of the state so construes a statute of that state that the provisions of the statute, plus the construction given it, operate to destroy a right guaranteed to the citizen by the Federal constitution.

Baccus v. *Louisiana,* 232 U. S. 334.

Ward & Gow v. *Krinsky,* 259 U. S. 503, 510.

By construing the statute of 1933 to apply retrospectively to decrees in existence at the date of passage so as to *cancel* rights fixed by a consent decree and discharge the obligation thereunder a Federal question is squarely raised. The application of a statute passed in 1933 to a contract or a decree entered in 1922 is clearly retroactive and in violation of Art. II, Sec. 14 of the State Constitution and Art. I, Sec. 10 of the Federal Constitution on impairing the obligation of contract; and Art. II, Sec. 2 of the State Constitution and Sec. 1, Amend. 14 of the Federal Constitution on due process.

Fuller v. *Fuller,* 49 R. I. 45, 139 Atl. 662.

Livingston v. *Livingston,* 173 N. Y. 377, 66 N. E. 123 (cited with approval in *Sistare* v. *Sistare,* 218 U. S. 1, at p. 24).

Blethen v. *Blethen,* 177 Wash. 431, 32 Pac. (2nd) 543.

Legislation that makes material alterations in the character, terms or legal effect of the existing contract is void. Since the court cannot modify prospective alimony in the absence of a reservation of that right either by the court or by a statute existing at the time of the decree, then it

may not modify prospective alimony under the terms of an amendment to the statute, but only under the terms of a statute existing at the time of the decree.

Goodsell v. *Goodsell,* 82 App. Div. 65, 81 N. Y. S. 806. (Cited with approval in *Sistare* v. *Sistare,* 218 U. S. 1, at pp. 24, 25.)

Kelley v. *Kelley,* 317 Ill. 104, 108.

The State Courts applied the Act of 1933 retroactively in the following manner. The Master in Chancery, whose report was affirmed by the trial court and the Supreme Court, said:

> "The language of the statute as amended is very definite and makes no exception, and in the opinion of the Master the situation of the parties involved in this proceeding comes clearly within the language of the amendment." (R. 75.)

The Supreme Court ruled:

> "Her rights became fixed as to accrued payments, but as to all payments maturing in the future she had no vested right. The trial court did not undertake to give the statute a retroactive effect for the decree made the modification effective as of the date of the filing of the petition. The amendment of 1933 to Section 18 of the Divorce Act does not affect any vested rights of respondent" (R. 232).

The decision of the State Court cannot be adequately and independently upheld without application of the Federal question, that is, the application of the Act of 1933. The State Supreme Court said:

> "The questioned provision of the amendment of Section 18 of the Divorce Act is the proviso 'that a party shall not be entitled to alimony and maintenance after remarriage.' It is urged that if this clause is given effect, and respondent's right to alimony taken away by reason of her remarriage, it takes from her vested rights contrary to the constitutional guarantees" (R. 231).

> "Prior to the amendment the general rule adopted by the courts was, that remarriage of a woman, who was receiving alimony from her former husband was such a change of condition as to *authorize* a modification of the decree to the extent of canceling the alimony payments. * * * The amendment merely adopted the general rule and made it *mandatory* upon the court to cancel alimony payments in all cases where the recipient had remarried, regardless of whether or not there had been a change in the financial condition of the former husband" (R. 231-232). (Italics added.)

The decision of the State Court makes cancellation of alimony *mandatory* on remarriage *regardless of the financial changes* of either party. Hence, the Divorce Court would now have no power to modify the award so as to again allow payments to the petitioner, Sara Adler. Before the statute of 1933 and this decision, the Divorce Court could at some future time on petition of Sara Adler modify the award here taken away on a showing of changed circumstances regardless of her remarriage. Since now the State Court under the rule of *res adjudicata* would have no such discretion, it becomes incumbent on this court to decide *"whether the judgment of the state is founded upon or in any manner gives the slightest effect to the subsequent act"* (*Bacon* v. *Texas,* 163 U. S. 207, 218). (Italics added.)

It is stated in *Abie State Bank* v. *Bryan,* 282 U. S. 765 at 773:

> "But the federal ground being present, *it is incumbent* upon this court, when it is urged that the decision of the State Court rests upon a non-federal ground, *to ascertain for itself,* in order that the constitutional guarantees may appropriately be enforced, whether the asserted non-federal ground *independently and adequately* supports the judgment." (Italics added.)

And again on the same page:

> "Where the non-federal ground is so interwoven with the other as not to be an independent matter, *or is*

not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." (Italics added.)

The decision of the State Court gives weight to the enactment of 1933 because it *compels destruction* of respondent's *obligation* on account of petitioner's remarriage, and is *res ajudicata* of any future petition for modification by her on account of changed financial conditions. This decision, therefore, cannot rest upon changed financial condition alone, or on the ground of remarriage under the old Act.

To permit the decision of the Illinois Court to rest upon those grounds alone is to ignore and thereby in effect affirm the decision of the Illinois Court that the Act of 1933 does apply retrospectively to all prior decrees thus allowing the destruction of rights vested in Sara Adler under the decree of 1922.

To save those vested rights this court should take jurisdiction to review the decision of the Illinois Supreme Court.

Respectfully submitted,

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